86-517

Supreme Court, U.S.
FILED
SEP 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

GRAYDON ROGER BOLES,

PETITIONER,

v.

T.E. ELLIS, T.D. COX, & DANNA MULLINIX,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Graydon Roger Boles
10117 North Tenth Street
Tampa, Florida 33612
(813) 972-3093

QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower court abused its discretion by not granting Rule 60 (b) (3) relief prior to a trial of this case?

2. Whether subsequent judgment in which cost were taxed against petitioner will be allowed to stand since issues pertaining to fraud and 6th Amendment deprivations were barred by virtue of respondent Mullinnix's dismissal from this lawsuit?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. _____

GRAYDON ROGER BOLES,

PETITIONER,

v.

T.E. ELLIS, T.D. COX, &
DANNA MULLINIX,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED

STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Graydon Roger Boles, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on May 15, 1986.

JURISDICTION

The jurisdiction of this court is invoked pursuant to the authority of Title 28 U.S.C.A. Section 1254 (1).[1]

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitutional Amendment IV:
The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . .

U.S. Constitutional Amendment VI:
. . . to be informed of the . . . cause of the accusation . . .

U.S. Constitutional Amendment XIV:
. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATE STATUTES INVOLVED

North Carolina General Statutes Sections 14-134 and 14-444.

STATEMENT OF THE CASE

Petitioner brought this action against respondents prior to his conviction in State Court pursuant to the authority of Title 28 U.S.C.A. Section 1343. Magistrate Eliason submitted erroneous fact findings and bias recommendation August 1, 1985. (appendix A & B) Petitioner responded by objection. Counsel for respondent Mullinnix alleged evidence submitted was inadmissable. The District Court allowed respondent Mullinnix's Motion For Summary Judgment and Motion to Dismiss.[2] The lower ruled upon petitioners written Rule 60 (b) (3) request disregarding the fact that respondent Mullinnix's affidavit in

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[1]Petition for rehearing was denied June 2, 1986.

[2]Petitioner told State Court Judge Wood that he had not entered premise after having been forbidden to do so and that he had not cussed or offered to fight co-respondent Ellis. The State Court affirmed the departure from constitutional mandate amendment 6 thus raising the federal question as to whether petitioner was mislead. Petitioner's appeal was rejected by virtue of his pro-se status. (State Ct. Transcript pp. 62, 8-10; pp. 69, exception noted, 12-18)

support of his Motion for Summary Judgment was submitted in bad faith. (appendix C) Petitioner appealed and moved for an order staying trial pending appeal. (appendix D & E) Trial was held March 24, 1986 wherein evidence previously excluded was admitted and other evidence excluded which was previously admitted. Lower court took the case from the jury upon the ground of insufficient evidence and thereafter ruled against petitioner's case.

REASONS FOR GRANTING THE WRIT

The lower court has abused its discretion by dismembering the conspiracy complained of and by excluding evidence which proves case beyond a shadow of a doubt. "The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." Consequently, a miscarriage of justice has occurred since the lower refused to take action on the following set of facts and barred them by virtue of a conviction which was obtained by fraud and other improper means.

1. Petitioner was charged and tried for entering the premise in the lawful custody of respondent Mullinnix after having been forbidden to do so without a license to do so and was found guilty in State District Court.[3]

2. Petitioner was charged and tried for cussing and offering to fight respondent Ellis and found guilty in State District Court. (pleading no. 1, exhibit no. 1)

3. Respondent Mullinnix has sworn that he knew of no one who forbade petitioner to enter premise after having been forbidden to do so. (pleading no. 27, entry 5)

4. Respondent Mullinnix has sworn that he was not working the date arrest took place. (State Ct. transcript pp. 7, 10-12)

5. Respondent Mullinnix has sworn that he was not in charge the date arrest took place. (State Ct. Transcript, pp. 9, 17-18)

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[3]"Any notion that a private person is necessarily immune from liability under section 1983 because of the 'under color of' requirement of the statute was put to rest by our holding in United States v. Price [86 S.Ct. 1152, 383 U.S. 787, 16 L. Ed. 2d 278]. There, in the context of a conspiracy, the court said: To act under color of law does not require that the accused be an officer of the state. It is enough that he is a willful participant in joint activity with the state."

6. By affidavit in support of respondent Mullinnix's Motion for Summary Judgment it is alleged that he was working the date of arrest. (pleading no. 96, entry 1)

7. Respondent Ellis admitted at Superior Court trial that he did not in fact know what petitioner was saying the date of arrest. (State Ct. Transcript pp. 15, 25; pp. 16, 1)

8. Respondent Mullinnix fraudulently testified in Superior court denying having knowledge of petitioner's credit at said establishment when he did in fact have knowledge of such credit prior to trial in November 1983. (State Ct. Transcript pp. 12, 20-23 and pleading nos. 12 and 27 entries 3 & 4)

9. All respondents have admitted that petitioner was being restrained the date arrest took place. (State Ct. Transcript pp. 6, 12-15; pp. 17, 6-7; pp. 28, 1-3) (appendix H)

10. Respondent Mullinnix changed his testimony in Federal Court pertaining to the number of people restraining petitioner in order to bar recovery for injuries inflicted by co-conspirators. (State Ct. Transcript pp. 6, 6-20; pleading no. 110, entry 32)

11. Petitioner was not informed of the cause of the accusation (lying in doorway) to be used against him until Superior Court proceedings were well underway. (State Ct. Transcript pp. 17, 3-8) (appendix I)

12. Respondent Cox swore that respondent Mullinnix stated that he had told petitioner to leave when in fact respondent Mullinnix told petitioner to remain inside.[4] (State Ct. Transcript pp. 28, 11-13; pp. 7, 18-19)

13. Petitioner was not informed of the cause of the accusation (refusing to leave) to be used against him until Superior Court Trial was well underway. (State Ct. Transcript pp. 6, 6-20; pp. 28, 11-14)

14. Petitioner was not informed of the cause (shouting or rudely insulting others) to be used against him until Superior Court Trial was underway.

Whatever factors of policy and fairness militate in favor of extending sovereign immunity to private persons acting in concert with state officials were resolved in favor of those who claim a deprivation of con-

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[4]"Claims of a conspiracy by state officers to convict a persion of a crime by knowing use of a perjured testimony are not categorically deficient in stating a claim under the civil rights act. Kauffman v. Moss 420 F2d 1270 cert denied, 400 U.S. 846, 27 L. Ed. 2d 84, 91 S. Ct. 93."

stitutional rights. A private individual shown to have acted in concert with officials may not rely upon any type of qualified immunity derivately or otherwise. Downs v. Sawtelle, 574 F. 2d 1, cert. denied, 99 S. ct. 278, 439 U.S. 910, 58 L. Ed. 255.

> If the original charge is abandoned probable cause cannot avail to aid the party making the charge in support of a subsequent charge of an entirely different offense.[5] The question of lack of probable cause for trespass prosecution must be determined in accordance with whether the facts and circumstances within the knowledge of the defendant at the time he instituted the criminal trespass prosecution were sufficient to induce a reasonably prudent man to believe that plaintiff was guilty of offense charged.

"If further investigation is needed after arrest, police have arrested without requisite probable cause and the individual must be released; if probable cause is in doubt, the investigation must precede arrest; anything less is a serious infringment of ones right to be secure in one's person. Dommer v. Hatcher, 427 F. Supp. 1040, reversed on other grounds, 638 F. 2d 1031."

The Fourth Circuit is of the opinion that petitioner appealed from a ruling of District Court refusing to reconsider the entry of summary judgment in favor of respondent Mullinnix. (appendix F & G) Petitioner moved pursuant to Rule 60 of the Federal rules of Civil Procedure and used the fact that respondent's affidavit in support of summary judgment was submitted in bad faith to place emphasis on the fact that fraud was upon the court. Petitioner is of the opinion that Rule 60 request are appealable.

Wherefore petitioner prays again for a writ to issue to review the judgment afore mentioned.

Graydon Roger Boles

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10117 North Tenth Street
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[5]Petitioner was charged at onset for assault on a female. (State Ct. Transcript pp. 5, 15-18; pp. 16, 5-6)

APPENDIX

A. ..... Magistrates Finding and Recommendation

B. ..... Court Order Date Stamped September 19, 1985

C. ..... Memorandum Date Stamped March 5, 1986

D. ..... Motion to Stay Pending Trial

E. ..... Court Order Date Stamped March 17, 1986

F. ..... Fourth Circuit Per Curiam Opinion

G. ..... Fourth Circuit Order Denying Rehearing

H. ..... N.C.G.S. Section 14-134

I. ..... N.C.G.S. Section 14-444

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

GRAYDON ROGER BOLES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C-83-613-G
	)	
T. E. ELLIS, T. D. COX and DANNA MULLINNIX,	)	
	)	
Defendants.	)	

MAGISTRATE'S FINDINGS AND RECOMMENDATION AND ORDER

This matter comes before the Court on defendant Mullinnix's motion for summary judgment. On June 27, 1983, plaintiff was arrested on charges of trespass, and being intoxicated and disruptive. He was tried by a North Carolina district court on September 29, 1983 and found guilty of both charges. On appeal to the superior court, on November 16, 1983, plaintiff was again convicted on both charges after a jury trial de novo. (Pleading no. 96.)

Subsequently, plaintiff filed the instant action alleging that the named defendants conspired to, and did, violate his constitutional rights in connection with his arrest and convictions. As to defendant Mullinnix, a private individual, plaintiff alleges that he conspired with state officers (police) to maliciously prosecute him. (Complaint; Pleading no. 68.) Although the complaint alleged a cause of action pursuant to 42 U.S.C. § 1985, this Court, in a prior Order, dismissed all claims under section 1985 for failure to state a claim and, instead, found plaintiff's claims to come under 42 U.S.C. § 1983. (Pleading no. 68.) Thus, as this action now stands, plaintiff alleges that defendant Mullinnix conspired with police to, and did, maliciously prosecute him in violation of 42 U.S.C. § 1983.

Defendant's motion for summary judgment is expressly based on the argument that plaintiff's state court convictions bar an action for malicious prosecution. (Pleading nos. 95-97.) Plaintiff opposes the

motion by arguing that a state conviction is not a sufficient basis for dismissal of a malicious prosecution claim. (Pleading no. 101.) After carefully reviewing the arguments of the parties, the Court finds that defendant's motion should be granted.

Violations of 42 U.S.C. § 1983 are determined under federal substantive law. **Pierson v. Ray,** 386 U.S. 547, 558 n.12, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); **Tucker v. Duncan,** 499 F.2d 963, 965 n.1 (4th Cir. 1974). In the case of an action brought for malicious prosecution, federal common law is the federal substantive law to be applied. **See Morrison v. Jones,** 551 F.2d 939, 940 (4th Cir. 1977) (adopting Virginia law). The Fourth Circuit holds that under federal common law a necessary element of an action for malicious prosecution is termination of the criminal proceedings favorable to the accused. **Id.** This was the rule at common law and is the rule in every jurisdiction in the United States. **Shulman v. Miskell,** 626 F.2d 173, 174 (D.C. Cir. 1980); **Dunn v. Tennessee,** 697 F.2d 121, 126 (6th Cir. 1982), **cert. denied,** 460 U.S. 1086 (1983). Therefore, this is the rule of law this Court is bound to apply to the instant case.[1] Since plaintiff was convicted of the charges

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[1]Plaintiff argues that under North Carolina law, a conviction obtained by fraud or other unfair means does not bar a subsequent action for malicious prosecution. He argues that this exception should be applied in the instant case because defendant fraudulently testified in the district court that he was in lawful custody of the subject premises and falsely testified in the superior court that he did not serve plaintiff on the night of his arrest. (Pleading nos. 72; 81; 103.) The Court finds plaintiff's arguments without merit.

Although plaintiff correctly cites North Carolina law, **see Falkner v. Almon,** 22 N.C. App. 643, 207 S.E.2d 388, 389 (1974), it is federal common law, not state law, that controls in this action and plaintiff has failed to direct the Court's attention to any authority stating that under federal common law the alleged exception applies. The Court notes that in **Morrison v. Jones,** 551 F.2d 939, 940 (4th Cir. 1977), the Fourth Circuit adopted Virginia law's elements for a malicious prosecution action as the federal common law, and that under Virginia law an exception similar to the one claimed by plaintiff does exist. **See Cramer v. Clutchfield**, 648 F.2d 943, 496 (4th Cir. 1981)-(diversity case applying Virginia law). However, the Court in **Morrison** did not specifically adopt or even refer to such an exception. **Even if the Court did adopt the exception as the federal common law, it would not affect the outcome in this case.**

he alleges were maliciously brought against him by defendant, the aforesaid rule precludes the instant action and defendant is entitled to judgment as a matter of law.

The Court additionally finds that defendant's motion to dismiss for lack of jurisdiction and for summary judgment (**see** pleading no. 53 and Order—pleading no. 68) should be granted on the grounds that he (Mullinnix) did not act under color of state law. **See Calvert v. Sharp,** 748 F.2d 861 (4th Cir. 1985). To be successful in an action brought pursuant to 42 U.S.C. § 1983, a plaintiff must allege and show the defendant acted under color of law in depriving him of his rights. 42 U.S.C. § 1983. Therefore, as a general rule, an action cannot be maintained against a private individual under this section. An exception exists where the plaintiff alleges and shows that the private individual acted in concert with state officers. A showing that the individual was a willful participat in a joint action with the state or its agents is sufficient. **Dennis v. Sparks,** 449 U.S. 24, 27, 66 L.Ed.2d 185, 101 S.Ct. 183 (1980).

In the instant action, plaintiff alleges defendant conspired with police. This allegation is sufficient to withstand a motion to dismiss for failure to state a claim. However, mere conclusory allegations of a conspiracy are insufficient to withstand an adequately supported motion for summary judgment. **Fullman v. Graddick,** 739 F.2d 553, 556 (11th

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[1]Continued

Plaintiff's allegations, that defendant fraudulently and/or falsely testified in the state courts, are conclusory and insufficient to support the exception plaintiff alleges. First, his allegations of fraudulent testimony in the district court is irrelevant due to his subsequent conviction in the superior court after a trial de novo. Second, he fails to allege or show the materiality or relevancy of the alleged false testimony in the superior court. Thus, the Court finds that plaintiff's allegations are insufficient to withstand defendant's motion for summary judgment.

In any event, plaintiff's allegations that his convictions were based on fraudulent and false testimony necessarily calls into question the validity of his convictions. Such claims are properly pursued under 28 U.S.C. § 2254 as they sound in habeas corpus, and are, therefore, subject to the exhaustion requirement. Since there has been no showing of exhaustion on these claims, the instant action would be required to be stayed pending such exhaustion. **Hamlin v. Warren,** 664 F.2d 29 (4th Cir. 1981), **cert. denied,** 455 U.S. 911 (1982). Thus, the Court finds that the exception plaintiff alleges should not be applied in the instant case to preclude summary judgment for the defendant.

Cir. 1984); **Fonda v. Gray,** 707 F.2d 435, 438 (9th Cir. 1983); **Henzel v. Gerstein,** 608 F.2d 654, 659 (5th Cir. 19870). Review of defendant's affidavit (pleading no. 96) in support of his motion for summary judgment reveals that his version of his participation in plaintiff's prosecution would be sufficient to overcome plaintiff's conclusory allegations of conspiracy. Thus, the Court finds that plaintiff's claim against defendant Mullinnix must fail for lack of sufficient allegations and proof that he formulated a "joint plan of action" with state officials. **Scott v. Greenville County,** 716 F.2d 1409 (4th Cir. 1983).

In addition to defendant's motion for summary judgment, several other motions are pending before the Court which should be addressed. First, plaintiff moves for the Court to order defendants to furnish him with the distance between the curb and the doorway at the Silver Fox Lounge, the scene of his arrest. (Pleading no. 117.) Defendants oppose this motion. (Pleading no. 118.) The record reveals that on August 24, 1984, plaintiff made a similar motion pursuant to rule 34 to enter the Silver Fox Lounge to take measurements. (Pleading no. 105.) The Court denied the motion on the basis that plaintiff had failed to show relevancy or that defendants were in control of the premises. (Pleading no. 109.) Since plaintiff has not presented the Court with any new evidence on this issue, the Court will deny his present motion for the same reasons and for the reason that plaintiff has not shown that he is unable to obtain this measurement himself.

Second, plaintiff moves for a default judgment against defendant Mullinnix pursuant to Fed.R.Civ.P. 37 for failure to comply with a Court Order dated September 28, 1984. (Pleading no. 120.) (**See**, Pleading nos. 114,116; and 119.) Specifically, he alleges that defendant failed to answer an interrogatory requesting the distance from the Silver Fox Lounge to the state right-of-way. (Pleading nos. 31;14.) He additionally alleges that a substantial number of defendant's answers are evasive or incomplete. **Id.** Review of this Court's September 28, 1984 Order reveals that defendent Mullinnix was ordered to serve plaintiff with answers to interrogatories 17-37 (pleading no. 92) within ten (10) days. (Pleading no. 109.) On October 5, 1984, defendant responded to interrogatories 20-37. (Pleading no. 110.) (Defendant did not respond to nos. 17, 18 and 19, but these had previously been answered. (Pleading nos. 98 and 111.) Interrogatory no. 31 requested the defendant to furnish the distance from the Lounge to the right-of-way. Defendant responded that he was unable to do so because he did not know where the right-of-way ended. (Pleading no. 110.) In light of this Court's prior findings that plaintiff has failed to show the defendant has control of the Silver Fox Lounge or the relevancy of this information, the Court finds defendant's objec-

tion to this interrogatory sufficient. Fed.R.Civ.P. 33(b). (Pleading no. 109.) As to the evasive and incomplete nature of the defendant's answers, plaintiff's conclusory allegations are insufficient to support his motion. Thus, the Court finds that plaintiff's motion for a default judgment should be denied.

Third, there is a pending motion by plaintiff for the Court to order defendants to produce certain transcripts from the state court criminal proceedings. (Pleading no. 76.) Plaintiff has not proffered to the Court any evidence indicating the relevance of these transcripts, nor has he informed the Court why he is unable to obtain these public records on his own. Therefore, the motion will be denied.

Finally, there are two motions in the record that have not been ruled upon by the Court despite subsequent proceedings and orders. The first is a motion by defendant Mullinnix, filed October 19, 1983, wherein he moves to dismiss this action as to him for failure of the plaintiff to prosecute and to comply with an Order of this Court. (Pleadings nos. 38 and 39.) Co-defendants Ellis and Cox had filed a similar motion on October 3, 1984. (Pleadings nos. 33 and 34.) On November 4, 1984, this Court denied the co-defendants' motion without specifically mentioning defendant Mullinnix's motion. Since both motions are based on the same ground for relief, the Court finds that the motion of defendant Mullinnix should be denied for the same reasons as was his co-defendants. Second, plaintiff has pending a motion for a default judgment against defendants Ellis and Cox. (Pleading no. 41.) After reviewing the motion, the Court finds it to be frivolous and therefore will deny it.

IT IS THEREFORE RECOMMENDED that defendant Mullinnix's motion to dismiss and for summary judgment be granted.

IT IS ORDERED that plaintiff's motion for defendants to furnish a certain distance at the Silver Fox Lounge be, and the same hereby is, denied.

IT IS FURTHER ORDERED that plaintiff's motion for a default judgment against defendant Mullinnix pursuant to rule 37, Fed.R.Civ.P., be, and the same hereby is, denied.

IT IS FURTHER ORDERED that plaintiff's motion for defendants to produce the transcripts of the state court criminal proceedings be, and the same hereby is, denied.

IT IS FURTHER ORDERED that defendant Mullinnix's motion to dismiss for failure of plaintiff to prosecute and to comply with an Order of this Court be, and the same hereby is, denied.

IT IS FURTHER ORDERED that plaintiff's motion for a default judgment against defendants Ellis and Cox be, and the same hereby is, denied.

_____

United States Magistrate

August 1, 1985

A True Copy

Teste:

J.P. Creekmore, Clerk

By:

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

GRAYDON ROGER BOLES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C-83-613-G
	)	
T. E. ELLIS, T. D. COX and DANNA MULLINNIX,	)	
	)	
	)	
Defendants.	)	

ORDER

On August 1, 1985, the United States Magistrate's Findings and Recommendation was filed and notice was served on the parties pursuant to 28 U.S.C. § 636. Thereafter, the Court received plaintiff's objections to parts of the Magistrate's Findings and Recommendation. Defendant Mullinnix filed a response in support of the Recommendation.

The Court has appropriately reviewed plaintiff's objections de novo and finds that they do not change the substance of the Magistrate's rulings which are affirmed.

IT IS THEREFORE ORDERED that pursuant to the Magistrate's Findings and Recommendation, defendant Mullinnix's motion to dismiss and for summary judgement is granted, and this defendant be, and the same hereby is, dismissed from this lawsuit.

United States District Judge

September 19, 1985

A True Copy
Teste:
J.P. Creekmore, Clerk
By:

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

GRAYDON ROGER BOLES, Plaintiff,	)	CIVIL ACTION NO. C-83-613-G
v.	)	
	)	**MEMORANDUM**
T. E. ELLIS, et al, Defendants.	)	

This matter was scheduled for final pretrial conference in the United States Courthouse, Greensboro, North Carolina, February 24, 1986. The plaintiff appeared pro se. Kenneth Jones, Esq., appeared for the defendants.

Plaintiff's motion for leave to obtain medical reports, X-rays, etc., was denied on the basis that the reports are the plaintiff's reports from his doctor and the plaintiff should be able to obtain those without an order from the Court.

Plaintiff's motion entitled "Motion for Order to Compel Discovery," filed February 14, 1984, was denied.

Plaintiff's motion entitled "Relief from Court Order" was not heard on the grounds that the Court order did not pertain to the plaintiff but to Mr. Mullinnix.

The plaintiff's motion to amend the complaint with respect to punitive damages was allowed.

The Court approved the pretrial order filed in this case and set the case for trial the first case on March 24, 1986. In this case, a motion in limine is pending filing by the defendants. The plaintiff shall respond to that motion on or before March 4, 1986. The parties shall file trial briefs, if any, proposed jury voir dire questions and proposed jury instructions on or before March 7, 1986.

I, Betty P. Julian, Official Reporter in the United States District Court for the Middle District of North Carolina, do hereby certify that the foregoing is a true transcript from my notes of the entries made in

the above-entitled Case No. C-83-613-G, before and by Judge Richard C. Erwin on February 24, 1986, in Greensboro.

Given under my hand this 4th day of March, 1986.

_____

Official Reporter

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

GRAYDON ROGER BOLES,	)	No. C-83-613-G
	)	
Plaintiff,	)	
	)	MOTION TO STAY
v.	)	TRIAL PENDING
	)	APPEAL.
T. E. ELLIS, et al,	)	
	)	
Defendants.	)	

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure the plaintiff moves the court for a stay of trial pending appeal.

GROUNDS

Fraud and other improper means were used to obtain plaintiff's conviction in Superior Court and this court has allowed defendant's Motion in Limine by court order date stamped 12 March 1986 which prohibits plaintiff's commenting on issue of probable cause. Material evidence has been excluded by trial court judge which unequivocally proves plaintiff's case on issue of probable cause.

RELIEF SOUGHT

Plaintiff prays for order staying trial until decision is reached pertaining to admissibility of evidence and reversal of order denying plaintiff's Rule 60 (F.R.Civ.R.) relief.

Graydon R. Boles

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

GRAYDON ROGER BOLES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C-83-613-G
	)	
T. E. ELLIS, et al,	)	
	)	
Defendants.	)	

ORDER

Plaintiff's Motion to Stay Trial Pending appeal pursuant to Rule 8 of the Federal Rules of Appellate Procedure is denied, based on the matters stted in this court's order on defendants' Motion in Limine.

The case remains on trial for 9:30 a.m., March 24, 1986.
IT IS SO ORDERED.

_____
United States District Judge

March 17, 1986

A True Copy

Teste:

J.P. Creekmore, Clerk

By:

_____
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3827

Graydon Roger Boles,

Appellant,

versus

T. E. Ellis,

Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Richard C. Erwin, District Judge. (C/A No. 83-613-G)

Submitted: March 19, 1986 Decided: April 11, 1986

Before RUSSELL, SPROUSE, and ERVIN, Circuit Judges.

(Graydon Roger Boles, Appellant Pro Se. Kenneth R. Keller, for Appellee.)

PER CURIAM:

Graydon Roger Boles appeals from a ruling of the district court, made at the final pretrial conference in this case, refusing to reconsider the entry of summary judgment in favor of defendant Mullinnix. We dismiss the appeal for lack of jurisdiction.

Under 28 U.S.C. § 1291, this Court has jurisdiction to review final decisions of the district court. A final judgment disposes of all issues in dispute as to all parties. "Federal appellate jurisdiction generally depends on the existence of a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" **Coopers & Lybrand v. Livesay,** 437 U.S. 463, 467 (1978) (quoting **Catlin v. United States,** 324 U.S. 229, 233 (1945). In this case, the district court's orders granting summary judgment for Mullinnix and refusing to reconsider the grant of summary judgment left the claims against defendants Ellis and Cox unresolved. The order which Boles seeks to appeal is thus not a "final" one as that term is used in § 1291. Nor does that order contain a direction for the entry of final judgment under Fed. R. Civ. P. 54(b) or a certification for interlocutory appeal under 28 U.S.C. § 1292(b). The order is not appealable under the exceptions provided in 28 U.S.C. § 1292(a) or in **Cohen v. Beneficial Industrial Loan Corp.,** 337 U.S. 541 (1949).

We accordingly dismiss the appeal for lack of jurisdiction. We dispense with oral argument because the dispositive issues recently have been decided authoritatively.

DISMISSED

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-3827

Graydon Roger Boles,

Appellant,

versus

T. E. Ellis,

Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Richard C. Erwin, District Judge

---

Upon consideration of the appellant's pro se petition for rehearing.

IT IS ORDERED that leave to file petition for rehearing is granted and petition for rehearing is denied.

Entered at the direction of Judge Ervin for a panel consisting of Judge Russell, Judge Sprouse and Judge Ervin.

For the Court

JOHN M. GREACEN
CLERK

APPENDIX H

§ 14-134. Trespass on land after being forbidden; license to look for estrays.

If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both: Provided, that if any person shall make a written affidavit before a magistrate of the county that any of his cattle or other livestock (which shall be specially described in such affidavit) have strayed away, and that he has good reason to believe that they are on the lands of a certain other person, then the magistrate may, in his discretion, allow the affiant to enter on the premises of such person with one or more servants, without fire-arms, in the daytime (Sunday excepted), between the hours of sunrise and sunset, and make search for his estrays for such limited time as to the magistrate shall appear reasonable. The only effect of such license shall be to protect the persons entering from indictment therefor, and the license shall have this effect only where it is made bona fide and the entry is effected without any damage except such as may be necessary to conduct the search. (1866, c. 60; Code, s. 1120; Rev., s. 3688; C.S., s. 4305; 1963, c. 1106; 1969, c. 1224, s. 12; 1973, c. 108, s. 3.)

Cross References. - As to forcible trespass, see § 14-126.

Legal Periodicals. - For note as to trespass prosecution not being discrimination by State, see 37 N.C.L. Rev. 73 (1958).

For discussion of the distinctions between the common-law crime of forcible trespass to real property and entry after being forbidden, see 39 N.C.L. Rev. 121 (1961).

For article dealing with the legal problems in southern desegregation, see 43 NC. Rev. 689 (1965).

Purpose. - This section is designed to protect possession regardless whether it be actual or constructive. State V. Baker, 231 N.C. 136, 56 S.E. 2d 424 (1949).

The law does not look to the motive of a proprietor but to the wrongful invasion of his property and to the disturbance of his right to undisputed possession. State v. Cobb, 262 N.C. 262, 136 S.E. 2d 674 (1964).

Essential Ingredients of Offense. - To constitute trespass on the land of another after notice or warning under this section, three essential

ingredients must coexist: (1) The land must be the land of the prosecutor in the sense that it is in either his actual or constructive possession; (2) the accused must enter upon the land intentionally; and (3) the accused must do this after being forbidden to do so by the prosecutor. State v. Baker, 231 N.C. 136, 56 S.E. 2d 424 (1949).

To consititute the offense forbidden by this section and with which defendants are charged there must be an entry on land after being forbidden; and such entry must be wilful, and not from ignorance, accident, or under a bona fide claim of right or license. State v. Cobb, 262 N.C. 262, 136 S.E. 2d 674 (1964).

§ 14-444. Intoxicated and disruptive in public.

(a) It shall be unlawful for any person in a public place to be intoxicated and disruptive in any of the following ways:

(1) Blocking or otherwise interfering with traffic on a highway or public vehicular area, or

(2) Blocking or lying across or otherwise preventing or interfering with access to or passage across a sidewalk or entrance to a building, or

(3) Grabbing, shoving, pushing or fighting others or challenging others to fight, or

(4) Cursing or shouting at or otherwise rudely insulting others, or

(5) Begging for money or other property.

(b) Any person who violates this section shall be guilty of a misdemeanor punishable by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than 30 days. Notwithstanding the provisions of G.S. 7A-273(1), a magistrate is not empowered to accept a guilty plea and enter judgment for this offense. (1977, 2nd Sess., c. 1134, s. 1.)

CASE NOTES

Mere public intoxication standing alone is no longer unlawful, and in order for there to be a chargeable offense, the intoxicated person must be disruptive in one or more of the ways described in subdivisions (1)-(5) of subsection (a). State v. Cooke, 49 N.C. App. 384,271 S.E.2d 561 (1980).

Section Not Violated. — This statute, making it unlawful for any person in a public place to be intoxicated and disruptive by cursing or

Section Not Violated. — This statute, making it unlawful for any person in a pubic place to be intoxicated and disruptive by cursing or shouting at or otherwise rudely insulting others, was not violated by defendant's conduct in standing in a motel parking lot in an intoxicated condition, looking up toward the sky, and shouting God is alive and God is in heaven and other words which sounded like a foreign language. State v. Cooke, 49 N.C. App. 384, 271 S.E.2d 561 (1980).